



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**WILL WILSON  
ATTORNEY GENERAL**

October 26, 1961

Honorable Oscar M. Laurel  
District Attorney  
Dimmit, Webb, Jim Hogg and  
Zapata Counties  
Laredo, Texas

Opinion No. WW-1176

Re: Whether Section 1 of  
Article 494a, C.C.P. is  
mandatory or discretionary  
in its application in view  
of Section 1a having been  
repealed by Acts of the  
56th Legislature and re-  
lated questions.

Dear Mr. Laurel:

You have requested an opinion on the following  
questions:

"1. Whether Section 1 of Article 494a,  
C.C.P. is mandatory or discretionary in  
its application in view of Section 1a  
having been repealed by Acts of the 1959,  
56th Legislature.

"2. If the language of Section 1 of the  
Article is mandatory in its application  
so that the Commissioners Court is obli-  
gated to pay the amounts provided therein  
to defense counsel, then from what County  
funds should such payments be made."

Article 494a is as follows:

"Section 1. Whenever the court shall  
appoint one or more counsel(s) to defend  
any person or persons pursuant to law in  
any felony case in this State, each counsel  
may, at the discretion of the trial judge,  
be paid a fee in the sum of Twenty-five  
Dollars (\$25) per day for each day such  
appointed attorney is actually in trial  
court representing the person he has been  
appointed to represent. Provided, further,  
that in all cases wherein a bona fide  
appeal is actually prosecuted to a final  
conclusion, each appointed counsel may be

paid One Hundred Dollars (\$100) for said appeal. Provided, however, on pleas of guilty before the court, said appointed counsel may be paid Ten Dollars (\$10) per case. The fee allowed counsel shall be paid by the county wherein such trial is held and such sum to be paid from county funds, where such funds are available.

"Sec. 1A. Repealed. Acts 1959, 56th Leg., 2nd C.S., p. 147, ch. 31 §2.

"Sec. 2. No such allowance shall be made unless an affidavit is filed with the clerk of the court by the defendant showing that he is wholly destitute of means to provide counsel, and that he has not been released on bail bond. As amended Acts 1959, 56th Leg. 2nd C.S., p. 147 ch. 31 §1."

The original 494a Vernon's Annotated Criminal Code was passed in 1951 by the 52nd Legislature. Section 1a therein provided:

"The Commissioners Court of any county in the State may determine within its discretion whether or not such county shall pay the fees provided herein."  
Acts 52nd Leg., 1951, ch. 19, p. 25.

In 1959 the Legislature rewrote what was the entire Chapter 19 of the 52nd Legislature (Article 494a). The changes written into the Act were:

1. Raising the fee from \$10.00 to \$25.00 per day in Section 1 and raising the fee on appeal from \$25.00 to \$100.00.
2. Adding the following sentence in Section 1:  
  
"Provided, however, on pleas of guilty before the court, said appointed counsel may be paid Ten Dollars (\$10) per case."
3. In Section 1 added the phrase:  
  
"where such funds are available"

to the last sentence of Section 1 so that the sentence reads:

"The fee allowed counsel shall be paid by the County wherein such trial is held and such sum to be paid from county funds, where such funds are available."

4. Section 1a was expressly repealed by Section 2 of the amended chapter as differentiated from the amended Section 2 of Article 494a, thus depriving the Commissioners' Court of their former discretion.

We conclude that the payment of the fees depends upon two factors:

1. The discretion of the trial judge as set out in Section 1 of 494a and
2. The availability of such funds as set out in the last sentence of Section 1 as amended.

It would, therefore, appear that where the trial judge has ordered such payment and where the county has available the money to pay the fee, such payment should be made. No other conclusion can be reached because the Legislature, by expressly repealing Section 1a, as set out above, has removed the matter from the discretion of the Commissioners' Court.

#### S U M M A R Y

Section 1 of Article 494a makes it mandatory for the county to pay the fees therein provided when such fees are ordered by the trial judge and such funds are available to the county.

Yours very truly,

WILL WILSON  
Attorney General of Texas

By   
Norman V. Suarez  
Assistant Attorney General

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APPROVED:  
OPINION COMMITTEE  
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REVIEWED FOR THE ATTORNEY GENERAL  
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